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Review of the efficiency of the administrative and financial functioning of the United Nations

Pilot project on the independent procurement challenge system

Report of the Secretary-General

Summary

In response to paragraph 16 of General Assembly resolution 62/269, the present report provides an update on the implementation of the pilot project on the independent procurement challenge system. It also provides information on the specific modalities of the procurement challenge system and related procedures, including possible legal and budgetary implications, in response to paragraph 13 of resolution 61/246. The Secretary-General has extended the pilot project until 30 June 2015 and expanded its scope in order to gain further experience in handling procurement challenges.

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I. Introduction

1. The present report is submitted in response to paragraph 13 of General Assembly resolution 61/246, in which the Assembly requested a report on the specific modalities of the bid protest system and related procedures, including possible legal and financial implications, and paragraph 16 of resolution 62/269, in which it requested the launch of the pilot project for the independent bid protest system and a report on the experience gained.

II. Background

2. A procurement challenge system was first proposed in a report of the Secretary-General on procurement reform (A/60/846/Add.5). Pursuant to General Assembly resolution 62/269, such a system was established on a pilot basis in the Secretariat in 2009.

3. The purpose of the procurement challenge system is to further enhance transparency in the procurement decision-making process (A/60/846/Add.5, para. 17). The system offers unsuccessful vendors that participated in tenders of the Organization the opportunity to file a procurement challenge on a post-award basis against a contract awarded by the United Nations. It also provides a mechanism for the Organization to take corrective action and/or provide a remedy when warranted. An effective procurement challenge system contributes to the improvement of procurement procedures and practices and strengthens internal control. Moreover, such a system supports good governance and accords with best practices in international public procurement.[1] As part of the pilot project, the experiences of other public organizations in this area were examined.

III. Launch of the pilot project

Establishment of the Award Review Board

4. The pilot project was launched in November 2009 with the establishment of the Award Review Board. The Chair of the Headquarters Committee on Contracts serves as the Registrar of the Board, and two staff members from the Committee's secretariat administratively support its operations. The Board has a roster of approved independent experts in procurement and procurement-related disputes who are called upon to provide written advice on the merits of a procurement challenge. For the purposes of the pilot project, eligibility for submitting a procurement challenge was limited to solicitations with an estimated value of at least $300,000 that were issued by the Procurement Division at Headquarters after November 2009. The main steps of the procurement challenge process are as follows:

[1] Article 67 of the United Nations Commission on International Trade Law Model Law on Public Procurement provides for the review by an independent review body of a decision or an action by a procuring entity or of the failure of a procuring entity to issue a decision. Likewise, the World Trade Organization Agreement on Government Procurement provides for a challenge procedure.

(a) **Submission of a procurement challenge**. An unsuccessful vendor requests a debriefing from the Procurement Division. If it is not satisfied with the debriefing, it may submit a procurement challenge to the Registrar of the Board within 10 business days of the debriefing;

(b) **Review by Award Review Board experts**. Once the Registrar confirms eligibility, the procurement challenge is assigned to a single Award Review Board expert or to a panel of three experts if the case is complex. The expert or panel of experts reviews the case with a view to determining whether the challenged procurement award accords with the evaluation and award criteria set out in the relevant solicitation documents, the applicable financial regulations and rules of the United Nations and the administrative issuances governing procurement. The expert findings and recommendations on the merits of the procurement challenge are set out in a written report. The experts may also make recommendations geared towards improving the quality of future solicitations or internal procurement procedures;

(c) **Decision-making**. The expert report is submitted to the Under-Secretary-General for Management for a final decision;

(d) **Notification/communication**. The Registrar communicates the final decision on the challenge to the vendor and the concerned internal parties.

Outcome and remedies

5. A procurement challenge is either denied or sustained. The challenger has the burden of proving the merits of its case. If the challenger fails to meet that burden, the procurement challenge will be denied. If the burden is met, the procurement challenge will be sustained, which gives rise to three possible remedies. First, the awarded contract may be limited to a one-year period instead of multiple years. This remedy would necessitate the prompt resolicitation of the requirement, to which the challenger would be invited. Second, the awarded contract may be cancelled. However, this remedy would necessitate the prior advice of the Office of Legal Affairs and the requisitioning office, in the light of potential contractual and operational impacts. Third, financial compensation up to a maximum of $50,000 may be granted to the challenger to cover the reimbursement of costs directly related to the procurement challenge procedure. Under the pilot project, attorney fees are excluded from such compensation. In addition, the experts may recommend other remedial action considered appropriate on the basis of their findings.

IV. Implementation of the pilot project

6. The launch of the pilot project entailed a number of start-up activities, including conducting research and benchmarking against existing challenge systems, consulting with internal stakeholders, external practitioners and academics, developing policies and procedures, establishing a database and developing information technology tools and procurement challenge forms. The Award Review Board secretariat also established an e-library composed of procurement challenge-related material for use by the Board experts. In addition, the secretariat identified and recommended a list of experts for consideration and approval by the Under-Secretary-General for Management and conducted an induction workshop for the

experts in 2009. In October 2009, the Procurement Division conducted training for its staff in performing debriefings and in procurement challenge procedures.

7. In its resolution 61/246, the General Assembly requested the inclusion of information, as appropriate, on the bid protest system on the website of the Procurement Division. In December 2009, relevant information was posted on the Procurement Division extranet (http://extranet.unsystem.org/pd/pilot_program.htm). In addition, eligible solicitations indicate the right of unsuccessful vendors to a debriefing and to submit a procurement challenge.

8. Between November 2009 and September 2012, the Procurement Division issued 779 solicitations, of which 459 were valued at $300,000 or more. During that same period, the Division conducted 52 debriefings, and 20 procurement challenges were submitted to the Registrar of the Award Review Board. Of those, 16 did not meet eligibility requirements. Two of the four remaining challenges were decided upon by the Under-Secretary-General for Management, taking into account reports by single Board experts: in one case the challenge was sustained, and in the other it was denied. The other two challenges were undecided as at the time of drafting of the present report. During the same period, the Board secretariat received a further 80 complaints unrelated to United Nations procurement actions.

V. Lessons learned from the pilot project

9. Despite the narrow scope of the pilot project and the modest number of challenges received, some lessons were learned, as summarized as follows:

(a) **Need for enhanced communication/outreach to vendors**. The main causes of requests for debriefing and procurement challenges were ambiguities found in some of the solicitation instruments, the revision of requirements due to operational reasons after initial solicitation issuance and the lack of understanding by vendors of United Nations procurement procedures;

(b) **Importance of debriefing**. The debriefing sessions proved to be useful to vendors in gaining a better understanding of why their proposals or bids were not successful which may assist them with future solicitations. Most vendors were satisfied with the debriefings conducted by the Procurement Division and did not submit procurement challenges. The debriefings provided opportunities to the Division to provide the vendor community with a better understanding of United Nations procurement policies and procedures. Feedback from the Division and requisitioner staff who participated in the debriefings was positive, indicating better understanding of the market's needs. Interaction with the vendors led to the recognition of the need to make changes to the wording of solicitation instruments. Another lesson learned was the continuing need to support and enhance internal capacity, both in the Division and in requisitioner offices, conduct the debriefings and channel lessons learned into improving the acquisition process;

(c) **Need for legal assistance**. In one challenge case, the vendor's legal counsel participated in the debriefing without the presence of the Office of Legal Affairs, which was disadvantageous to the United Nations. The Board expert who reviewed the case recommended that the United Nations arrange for legal representation at debriefings when the challenger is represented by counsel. It is

considered advisable that the future procurement challenge system provide for the active involvement of the Office of Legal Affairs on an "as and when needed" basis;

(d) **Vendor interest in the procurement challenge system**. The vendor community appears interested in the procurement challenge system. For instance, although not eligible under the pilot project, several vendors in peacekeeping locations submitted procurement challenges regarding contract awards made by peacekeeping missions. Vendor interest, coupled with an expanded system for procurement challenges, will provide further opportunities to learn lessons and provide management at Headquarters with an additional vantage point from which to assess how well the acquisition process is functioning in other duty stations;

(e) **Improved transparency**. The debriefings conducted by the Procurement Division have already led to improvements in the text of the regret letter, which now includes information on both the debriefing and the procurement challenge procedures. The solicitation documents also include a section on procurement challenge procedures and provide a link to the Division's website.

VI. Expanded scope and extension of the pilot project

10. While lessons have been learned, the Secretary-General considers that further experience under the pilot project is both necessary and desirable. Bearing in mind the challenge system's utility and contributions to enhancing internal procedures and practices, the pilot project has been extended until 30 June 2015, with an expanded scope as follows:

(a) **Expanded scope**. The eligibility threshold will be lowered from $300,000 to $200,000, and solicitations issued by the Regional Procurement Office in Entebbe, Uganda, which is an integral part of the Procurement Division, will also be eligible for procurement challenges. It is estimated that these two changes will result in a 30 per cent increase in the number of procurement awards subject to challenge;

(b) **Introduction of an alternative dispute resolution procedure**. Research indicates that alternative dispute resolution has been effectively used by some Government agencies in dealing with procurement challenges. Alternative dispute resolution is a voluntary, informal process for dealing with disputes whereby a third party will facilitate the discussion of the parties towards resolution. It is considered useful to include an alternative dispute resolution procedure in the procurement challenge system as an option. In broad terms, the process would involve an Award Review Board expert, who would serve as the third party and meet informally with authorized representatives of the United Nations and the vendor. Alternative dispute resolution can be expeditious in resolving disputes, an important consideration for all parties when dealing with procurement challenges;

(c) **Financial compensation**. The current maximum financial compensation payable to a successful challenger is $50,000 to cover the cost of the procurement challenge, excluding attorney fees. However, research indicates that, when a procurement challenge is sustained, some Government agencies permit the reimbursement of reasonable attorney's fees. The Secretary-General has thus decided to include the reimbursement of reasonable attorney's fees within the

maximum amount. This is considered fair, as the vendor is reimbursed for an out-of-pocket expense arising out of a sustained procurement challenge;

(d) **Systematic training**. To support the expanded scope, the Procurement Division will offer additional training to its Procurement Officers, including those serving in the Regional Procurement Office, and requisitioner offices that participate in the debriefings.

11. Taking into account the further experience that will be gained under the pilot project going forward, the Secretary-General will provide the General Assembly with his recommendations on future budgetary and staffing requirements to support the procurement challenge system after 2014. Until then, the extended pilot project will, as has been the case, continue to be accommodated within the existing resources of the secretariat of the Headquarters Committee on Contracts, the Procurement Division and requisitioner offices.

VII. Conclusions and recommendations

12. **It is recommended that the General Assembly:**

(a) **Take note of the report and the extension of the pilot project until 30 June 2015;**

(b) **Request the Secretary-General to report to the Assembly at its sixty-ninth session on the experience gained under the extended pilot project and provide the Assembly with his proposals, including budgetary and staffing implications, for establishing a formal procurement challenge system in the United Nations.**